IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BIENVENIDO MATIAS	:	CIVIL ACTION
	:	
v.	:	
	:	
DAVID LARKINS	:	NO. 97-2647

MEMORANDUM AND ORDER

Norma L. Shapiro, J. May 12, 1998

After pleading guilty and being sentenced in the Court of Common Pleas for aggravated assault, Bienvenido Matias ("Matias") appealed his sentence. His appeal was denied and he exhausted state remedies; he then filed a timely petition for writ of habeas corpus under 28 U.S.C. § 2254. The petition was referred to Chief Magistrate Judge Melinson for a Report and Recommendation. Matias, claiming that the sentence violated the Eighth Amendment, equal protection and due process, filed objections to the Report and Recommendation. He argues that because the crimes of aggravated assault and attempt to murder merge for sentencing purposes, he could not have been sentenced to more than the statutory maximum for attempt to murder, a crime with which he was not charged. Since he was charged with aggravated assault only, the crimes did not merge. Even if he had been charged with both crimes, the court could have sentenced Matias to the penalty for either crime, whichever carried the greater penalty. The sentence did not violate the Eighth Amendment, equal protection or due process. The Report will be accepted. The objections to the Report and Recommendation will be overruled, and the Recommendation will be adopted. The

petition for writ of habeas corpus will be denied.

FACTS

On June 27, 1991, Matias assaulted Sandra Muniz ("Muniz") with a box cutter, cutting her on the neck, head, abdomen, and legs. When a bystander, Elisto Castro ("Castro"), attempted to help Muniz, Matias sliced Castro in the stomach. Matias pled guilty in state court to aggravated assault as a felony in the first degree, aggravated assault as a felony in the second degree, and possession of an instrument of crime. He was sentenced to ten to twenty years imprisonment for aggravated assault, a concurrent term of five to ten years for the second aggravated assault, and a consecutive term of one to two years for possessing an instrument of crime. After exhausting state remedies, Matias timely filed this petition for writ of habeas corpus.

DISCUSSION

A petition for writ of habeas corpus under 28 U.S.C. § 2254 may challenge only "violation[s] of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254 (West 1994), not an incorrect application of state law. Matias's petition for writ of habeas corpus alleges violations of the Eighth Amendment, and equal protection and due process under the Fourteenth Amendment.

Matias argues that under Pennsylvania law aggravated assault is a lesser included offense within the crime of attempt to murder. In June, 1991, the date of the incident, aggravated

assault was a felony in the first degree, 18 Pa. Cons. Stat. Ann. § 2702(b) (West 1994), with a maximum penalty of twenty years, 18 Pa. Cons. Stat. Ann. § 1103(1) (West 1994). Attempt to murder was a second degree felony, 18 Pa. Cons. Stat. Ann. § 905(a) (West 1994), with a maximum penalty of ten years, 18 Pa. Cons. Stat. Ann. § 1103(2) (West 1994). Although he was not charged with attempt to murder, he alleges that the state violated the Eighth Amendment, equal protection, and due process when it sentenced him to a greater sentence for aggravated assault than it could have for attempt to murder because aggravated assault is a lesser included offense within the crime of attempt to murder. A discussion of state sentencing law is necessary to consider Matias's federal claims.

I. State Sentence

For merger purposes, aggravated assault is a "lesser included" crime within the "greater" crime of attempt to murder. "It is clear that the offense of aggravated assault is necessarily included within the offense of attempted murder; every element of aggravated assault is subsumed in the elements of attempted murder. . . . [T]he two offenses merge for purposes of sentencing." Commonwealth v. Anderson, 650 A.2d 20, 24 (Pa. 1994), as modified, 653 A.2d 615 (Pa. 1994).[1]

[1] Magistrate Judge Melinson's Report and Recommendation incorrectly agreed with the trial court's conclusion that the two offenses did not merge. (Report and Recommendation, p. 7). The court agrees with reasoning of the other portions of the Report and Recommendation, and its disagreement with Magistrate Judge Melinson's merger analysis does not affect the outcome of

The function of the merger doctrine "is to determine whether the legislature intends that a single sentence should constitute all of the punishment for offenses that arise from the same criminal act or transaction," not what the appropriate punishment for all those offenses should be. Commonwealth v. Everett, 705 A.2d 837, 839 (Pa. 1998). "Lesser included" and "greater" refer to the relationship between the elements the prosecutor must prove for each crime. Two crimes merge when, in establishing the "greater" crime, the prosecutor has proved all the elements of the "lesser included" crime. Anderson, 650 A.2d at 21. The principle of merger prevents separate punishment for both offenses if the defendant has been indicted, convicted and punished for either. See Commonwealth v. McCusker, 70 A.2d 273 (Pa. 1950).

When two crimes merge, the legislature intended for both offenses to be subsumed in one punishment, whatever that punishment may be. Since Matias was charged only with aggravated assault not attempt to murder, his crime was not a "lesser included" offense of an uncharged crime; there was no charged offense with which his offense could merge. "[W]hen only aggravated assault is charged it is considered in and of itself, because no offense within which it could be included or into which it may merge exists." Commonwealth v. Spells, 612 A.2d 458, 461 (Pa. 1992). Matias's argument that he cannot be

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Matias's petition for habeas corpus.

punished to the statutory maximum for the "lesser included" crime because it would have merged with the "greater" crime had he been charged with both crimes is wrong because the crimes do not merge unless they are both charged.

Matias suggests that attempt to murder "is more serious" than aggravated assault, (Memorandum in Support of Petition for Writ of Habeas Corpus, p. 9), because it is the "greater" crime under the merger doctrine, that is, the prosecutor must prove more elements. However, under Pennsylvania law the more serious crime is "the one to which the legislature attached the greatest possible maximum penalty." Commonwealth v. Boerner, 422 A.2d 583, 590 (Pa. Super. 1980). See also Commonwealth v. Nelson, 305 A.2d 369 (Pa. 1973) (finding the crime the legislature had established as the most serious was the one to which it attached the maximum possible penalty). In Commonwealth v Everett, the Supreme Court of Pennsylvania held that Everett, who had pled guilty to both attempt to murder and aggravated assault, could be sentenced to eight to twenty years for the "lesser included" offense of aggravated assault, even though the "greater" offense of attempt to murder had a maximum sentence of five to ten years. Everett, 705 A.2d at 839. The more serious crime is the one to which the legislature has attached the greatest penalty.

Matias was charged with aggravated assault only and was legally sentenced to the statutory maximum for that crime. Even if he had pled guilty to both aggravated assault and attempt to murder, he could have been sentenced to whichever carried the

greater punishment. Aggravated assault did not merge with attempt to murder, but, even if it had, Matias could have been legally sentenced to ten to twenty years.

II. Constitutional Challenges

Matias makes three constitutional arguments against the imposition of the greater sentence for the lesser crime: it constitutes cruel and unusual punishment prohibited under the Eighth Amendment; it violates equal protection; and it violates due process.

A. Cruel and Unusual Punishment

Matias, citing Solem v. Helm, 463 U.S. 277, 290 (1983), argues that the sentence is disproportionate to the crime. Matias bases his argument on the merger doctrine, and asserts that it is irrational for the legislature to punish aggravated assault more seriously than attempt to murder.

In Solem, the Supreme Court held that the Eighth Amendment's proscription of cruel and unusual punishment prohibits a sentence disproportionate to the crime committed. Solem, 463 U.S. at 290. In order to determine proportionality, the Court employed a three factor test: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for the same crime in other jurisdictions. Id. at 292.

The Solem proportionality analysis was questioned by the Supreme Court in Harmelin v. Michigan, 501 U.S. 957 (1991). In Harmelin, the Supreme Court denied a proportionality challenge to

an inmate's sentence to life in prison without the possibility of parole for possessing more than 650 grams of cocaine. There was no majority opinion, but Justice Scalia, writing for a plurality, in announcing the judgment of the court, concluded that "Solem was simply wrong; the Eighth Amendment contains no proportionality guarantee." Harmelin, 501 U.S. at 965 (opinion of Scalia, J., joined by Rehnquist, C.J.). Justice Kennedy, also writing for a plurality concurring in the judgment, stated that "the Eighth Amendment does not require strict proportionality between crime and sentence[,] ... [but] forbids only extreme sentences that are 'grossly disproportionate' to the crime." Id. at 1001 (opinion of Kennedy, J., concurring in part, and concurring in the judgment, joined by O'Connor and Souter, JJ.) (quoting Solem, 463 U.S. at 288). Justice Kennedy found that a "better reading of [Supreme Court] cases leads to the conclusion that intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." Harmelin, 501 U.S. at 1004-05 (opinion of Kennedy, J.). Consistent with the view that sentencing schemes will be struck down only where grossly disproportionate, Justice Kennedy stated that courts must grant "substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes." Id., at 999 (citing cases). Three of the four dissenting justices filed opinions. Id. at 1009

(opinion of White, J., dissenting, joined by Blackmun and Stevens, JJ.); id. at 1027 (opinion of Marshall, J., dissenting); id. at 1028 (opinion of Stevens, J., dissenting, joined by Blackmun, J.).

It is unclear which, if any, of these views of the Eighth Amendment Cruel and Unusual Punishment Clause will ultimately prevail. See, e.g., United States v. Frazier, 981 F.2d 92, 95-96 (3d Cir. 1992), cert. denied 507 U.S. 1010 (1993). But it is clear from Harmelin that sentences not "grossly disproportionate" with the crime are constitutional. See United States v. Sarbello, 985 F.2d 716, 724 (3d Cir. 1993) (in a RICO forfeiture case "some proportionality analysis is required upon the defendant's prima facie showing that the sentence is grossly disproportionate"). Intrajurisdictional and interjurisdictional comparisons should be made only in the rare instance when comparing the crime and punishment "leads to an inference of gross disproportionality." Harmelin, 501 U.S. at 1004-05 (opinion of Kennedy, J.).

Matias attacked Muniz with a box cutter, and sliced her "neck, head, body, leg and abdomen/stomach area." (Memorandum in Support of Petition for Writ of Habeas Corpus, p. 2). As a result of those injuries, she required more than five hundred stitches. Id. She was so badly wounded that her heart stopped, and the doctors had to revive her. Id. When Castro came to her aid, he was attacked by Matias and required thirteen stitches. Id. at 2-3. After pleading guilty, Matias was sentenced to ten

to twenty years. Matias's actions were grave, and significant punishment was not inappropriate. A comparison of the crime and sentence imposed does not lead to an inference of gross disproportionality, and an intrajurisdictional and interjurisdictional analysis of comparative sentences is not necessary.

Matias's argument that the sentence is disproportionate because it is higher than it would have been if he had been convicted of the "greater" crime of attempt to murder was rejected by the Court of Appeals for the Fourth Circuit in Sutton v. Maryland, 886 F.2d 708 (4th Cir. 1989), cert denied, 494 U.S. 1036 (1990). Sutton was charged with common law assault, but not with a specific assault crime, such as assault with intent to rob, or assault with intent to maim, disfigure or disable. Sutton, 886 F.2d at 710. "Under Maryland precedent, a charge of common law assault is a lesser included offense to any one of the various statutory crimes of assault." Id. Those specific assault crimes had statutory maximums of ten years, but common law assault had no statutory maximum and was limited only by the Eighth Amendment's prohibition against cruel and unusual punishment. Id. Sutton was sentenced to fifteen years. Id. at 709. The district court found that the proportionality principle of the Eighth Amendment required that Sutton not be punished more severely for common law assault than for the least aggravated form of statutory assault for which he could have been prosecuted and convicted; Sutton's petition for writ of habeas corpus was

granted to the extent his sentence exceeded ten years. Id. at 710.

On appeal, the Court of Appeals found that "[c]ommon law assault is only a lesser included offense when two assault offenses are charged on the same set of facts." Id. at 711. Since Sutton was charged only with common law assault, that crime did not merge with any other; the sentence was limited by the Eighth Amendment but not the maximum for any of the statutory crimes. Id. at 713. It was "not clear whether a proportionality analysis, as enunciated in Solem, [was] required in this case," id. at 712, but assuming it were, the Court of Appeals rejected Sutton's claim that the sentence was disproportionate. Id. at 713.

Matias's arguments parallel those rejected in Sutton. In Pennsylvania, the crime of aggravated assault merges with attempt to murder only when they are both charged on the same set of facts. Matias was not charged with attempt to murder, so there was no merger, and Matias's sentence for aggravated assault was not limited by the statutory maximum term for attempt to murder. Matias's sentence was limited only by the statutory maximum on aggravated assault and the Eighth Amendment. The sentence was within the statutory limit for aggravated assault. See 18 Pa. Cons. Stat. Ann. § 1103(1) (West 1994). Even if a limited proportionality analysis is required after Harmelin, Matias's actions were serious and the punishment not unreasonable, so there was no inference of gross disproportionality between crime

and punishment.

B. Equal Protection and Due Process

Matias's sentence does not violate the Equal Protection or Due Process Clauses of the Fourteenth Amendment; "when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." U.S. v. Batchelder, 442 U.S. 114, 123-24 (1979). If Matias committed both aggravated assault and attempt to murder, the District Attorney could choose to prosecute under either statute, so long as his choice was not "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (citation omitted).

Matias does not allege that the District Attorney's prosecution or his sentence after his guilty plea was based on race, religion, or other arbitrary classification, but argues that sentencing some offenders under one statute to a maximum term of ten years and others under a different statute to a maximum term of twenty years violates equal protection and due process.[2]

The Supreme Court rejected this argument in Batchelder.

[2] Matias cites Johnson v. Smith, 696 F.2d 1334 (11th Cir. 1983) for the proposition that the sentencing scheme violates equal protection, but the Court of Appeals for the Eleventh Circuit has subsequently stated that "[i]n view of . . . intervening Supreme Court precedents, Johnson . . . appears to be overruled." Dawson v. Scott, 50 F.3d 884, 892 n. 20 (11th Cir. 1995). Matias cites no cases for the proposition that the sentence violates due process.

Congress had enacted two statutes proscribing the same behavior, but authorizing different penalties. The Court stated that, subject to constitutional constraints, the prosecutor had discretion regarding which charge to file or bring before a grand jury. Batchelder, 442 U.S. at 124. A decision to proceed under one statute did not give the prosecutor the authority to predetermine ultimate criminal sanctions; it merely enabled the sentencing judge to impose a longer prison sentence than the other statute would permit. Id. at 125. "The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process clause." Id.

The Philadelphia District Attorney had discretion in determining whether to charge Matias with aggravated assault or attempt to murder. Whether or not Matias could have been convicted of attempted murder, the prosecutor's charging Matias with aggravated assault only, enabling a twenty year statutory maximum sentence, was not an equal protection or due process violation.

CONCLUSION

Matias's charge of aggravated assault did not merge with attempt to murder because that crime was not charged. Even if it had been charged, Matias could have been sentenced to whichever crime carried the greater term. The crime and punishment did not create an inference of gross disproportionality, and the sentence did not violate the Eighth Amendment. The prosecutor had

discretion regarding the charge to file; his exercise of that discretion did not violate the Equal Protection or Due Process Clauses of the Fourteenth Amendment. The Report is accepted; Matias's objections are overruled; and the Recommendation is adopted. The petition for writ of habeas corpus is denied.

An appropriate order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BIENVENIDO MATIAS	:	CIVIL ACTION
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v.	:	
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DAVID LARKINS	:	NO. 97-2647

ORDER

AND NOW this 12th day of May, 1998, upon consideration of petitioner's Petition for Writ of Habeas Corpus and Memorandum of Law in support thereof, respondent's response in opposition to the Writ of Habeas Corpus, the Report and Recommendation of Chief Magistrate Judge James Melinson, the petitioner's objections to the Report and Recommendation, and the respondent's response to petitioner's objections, the court having conducted a de novo review of the petition, it is **ORDERED** that:

1. The Report of Chief Magistrate Judge Melinson is accepted, and his Recommendation adopted.

2. The objections to the Report and Recommendation are overruled.

3. The petition for writ of habeas corpus is **DENIED**.

4. There is no probable cause to issue a certificate of appealability.

Norma L. Shapiro, J